tain contingency,[17] namely, the grading of the street by the municipality, and this having occurred, the right in the nature of a gift, became absolute and irrevocable.[18]

DOWER IN FRAUDULENT CONVEYANCES.—The attitude of the English courts in refusing to afford the protection to dower[1] which they grant to curtesy[2] may be justified on the ground that at common law the husband was considered a purchaser of the wife's property, while it was presumed that she was well provided for by jointure.[3] This presumption had the effect of a rule of law. Consequently, although a conveyance by him was not deemed to be in fraud of her rights, her deed delivered on the eve of marriage could be set aside by him. On principle, the denial of relief to the wife or the husband in such a case would be proper, for until the marital relation is established the interest of either party in the property of the other is not a vested legal right, but a mere expectancy. Nor is there any reason to consider either party a purchaser of the other's possessions.[4] In America, however, where jointures have never been recognized,[5] the courts have refused to accept any distinction between dower and curtesy, and have, therefore, shielded dower from the results of fraudulent ante-nuptial transfers.[6] Since no sound principle underlies the operation of the doctrine, there is great confusion of judicial opinion as to its limitations, particularly in ascertaining what proof is necessary to warrant a nullification of the pre-marital conveyance.[7] Although, in some

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[17]Reynolds *v.* Common Council (1893) 140 N. Y. 300; Taylor *v.* Woodward (1858) 10 Cal. 91; see Harris *v.* Townshend (1883) 56 Vt. 716. It has been held that a right analogous to the one involved in the principal case was assignable and passed to an assignee in bankruptcy. Brandon *v.* Sands (1794) 2 Ves. Jr. 514; Meech *v.* Stoner (1859) 19 N. Y. 26; Palen *v.* Johnson (N. Y. 1866) 46 Barb. 21.

[18]Elgin *v.* Eaton (1876) 83 Ill. 535; Hunt *v.* Gulick (1827) 9 N. J. L. 258; see Harrington *v.* County Commrs. (Mass. 1839) 22 Pick. 263; *contra,* Hampton *v.* Commonwealth (1852) 19 Pa. 329; Dyer *v.* Ellington (1900) 126 N. C. 941.

[1]Swannock *v.* Lyford (1741) Ambler 6; 3 Co. Lit. (15th ed.) 208a, note 105; Bottomly *v.* Lord Fairfax (1712) Prec. in Chancery 336. Formerly, dower was highly favored in England, as a softening of the feudal principle of the gift of land for life. 1 Cruise, Digest, 127, 134 *et seq.*

[2]Carleton *v.* Dorset (1686) 2 Vern. 17; Goddard *v.* Snow (1826) 1 Russ. 485.

[3]Swannock *v.* Lyford, *supra.*

[4]Nelson *v.* Brown (1910) 164 Ala. 397; *contra,* Bookout *v.* Bookout (1898) 150 Ind. 63.

[5]Chandler *v.* Hollingsworth (1867) 3 Del. Ch. 99.

[6]Swaine *v.* Perine (N. Y. 1821) 5 Johns. Ch. 482; Kelly *v.* McGrath (1881) 70 Ala. 75; Ward *v.* Ward (1900) 63 Oh. St. 125; Chandler *v.* Hollingsworth. *supra;* see Arnegaard *v.* Arnegaard (1898) 7 N. Dak. 475. The law courts, on the other hand, have been very reluctant to adopt this principle, because until the legal interest vests there is nothing of which the law can take cognizance, although it may be a fraud. Baker *v.* Chase (N. Y. 1844) 6 Hill 482.

[7]See Leonard *v.* Leonard (1902) 181 Mass. 458; Jenkins *v.* Rhodes (1907) 106 Va. 564.

jurisdictions, any conveyance in contemplation of marriage was once deemed to raise a conclusive presumption of fraud,[8] the present trend of judicial opinion seems to pursue a more just theory and to hold such conveyances as mere indicia of fraud which may be explained by proof[9] that the conveyance was made for value, or for the reasonable provision of children by a former marriage.[10] The conflict of the decisions on this subject is also shown by the cases determining whether the particular person with whom the marriage is ultimately consummated must be in contemplation at the date of the transfer.[11]

From the standpoint of strict principle a still more anomalous position is reached by the decisions in cases where the wife has, with knowledge of the design,[12] joined her husband in a conveyance to defraud his creditors. If the deed is set aside by the injured parties, her dower rights revive because the conveyance is defeated for all purposes;[13] and it is well settled that dower is not released by implication, but only as an incident of the fee.[14] In such a case, moreover, an estoppel against the wife can only be invoked in favor of the grantee and his privies, so the creditors who must claim in direct opposition to the deed cannot defeat the revival of dower upon this ground.[15]

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[8]Ward *v.* Ward, *supra;* see Arnegaard *v.* Arnegaard, *supra.*

[9]Dunbar *v.* Dunbar (1912) 254 Ill. 281; Daniher *v.* Daniher (1903) 201 Ill. 489; Fennessey *v.* Fennessey (1886) 84 Ky. 519. If before marriage the wife has notice of the transfer, according to the weight of authority, she is estopped to assert her rights. Smith *v.* Erwin (1904) 82 S. W. 411; Collins *v.* Smith (Ia. 1909) 122 N. W. 839. See Jenkins *v.* Rhodes, *supra.* But see Cook *v.* Lee (1904) 72 N. H. 569.

[10]Daniher *v.* Daniher, *supra;* Bookout *v.* Bookout, *supra;* Dunbar *v.* Dunbar, *supra;* Tate *v.* Tate (N. C. 1834) 1 Dev. & Blat. Eq. 22; Champlin *v.* Champlin (1888) 16 R. I. 314. The last case might be justified on the ground that there was a trust to convey the property.

[11]Higgins *v.* Higgins (1905) 219 Ill. 146; 6 COLUMBIA LAW REVIEW 274. And see Beechley *v.* Beechley (1907) 134 Ia. 76. The following cases seem contrary to this view and are in accord with the English view as to curtesy. Bliss *v.* West (N. Y. 1890) 58 Hun 71; Nelson *v.* Brown, *supra.* See Countess of Strathmore *v.* Bowes (1788) 2 Bro. C. C. 345.

[12]If the wife is innocent of the design the rule is, of course, the same, and is then particularly equitable.

[13]Malloney *v.* Horan (1872) 49 N. Y. 111; Cox *v.* Wilder (U. S. C. C. 1872) 2 Dill. 45; reversing the District Court in Cox *v.* Wilder (1870) 5 Nat. Bank Reg. 443; *contra,* Meyer *v.* Mohr (N. Y. 1863) 19 Abb. Pr. 299, and see Morton *v.* Noble (1870) 57 Ill. 176. Den *ex dem.* Stewart *v.* Johnson (1840) 18 N. J. L. 87; *Ex parte* Bell (1822) 1 Glyn & J. 282. If the common law dower has been abolished and the wife simply receives a share of the property of which the husband is seised at his death, she cannot be remitted to her common law rights, and therefore, will receive no dower in the premises so conveyed. See Bond *v.* Bond (Tenn. 1886) 16 Lea 306. Where a deed is given before marriage fraudulent as to creditors, who later set it aside, the wife is not dowable. Whithead *v.* Mallory (Mass. 1849) 4 Cush. 138; Gross *v.* Lange (1879) 70 Mo. 45.

[14]See *In re* Lingafelter (1910) 181 Fed. 24.

[15]Malloney *v.* Horan, *supra;* Munger *v.* Perkins (1885) 62 Wis. 499; Ridgway *v.* Masting (1872) 23 Oh. St. 294. The creditor's suit is not *res judicata* as to her suit, for her dower rights were not in issue. Huntzicker *v.* Crocker (1908) 135 Wis. 38; Humes *v.* Scruggs (1879) 64 Ala. 40.

If her suit is in equity, her actual fraud will not bar her relief,[16] although she can hardly be said to invoke its aid with "clean hands," and the recovery can only be justified on the now somewhat doubtful principle of the control of the husband over the wife. If, moreover, the deed is not set aside by creditors, neither husband nor wife can impeach its validity against the interests of the grantee;[17] and since there is no resulting trust in their favor,[18] it would seem that even if the conveyance were annulled as to rights of the husband in the property, the transfer might act as an assignment of the wife's dower to the grantee, because neither she nor the creditors are equitably entitled to it;[19] but this is not the view of the majority of the courts. And when the fraudulent conveyance is made to the wife it has been held that she will not lose her dower if the transfer is declared invalid, because the dower will not be deemed to have merged with the larger estate.[20] This seems rather doubtful because if the wife is innocent, between her husband and herself, at least, the title is absolutely vested.

The persistency of the courts to protect the inchoate right of dower, is well illustrated in cases where the husband, in order to defraud his wife, takes the title to real estate, for which he has furnished the purchase price, in the name of trustees for his benefit. In such instances equity will generally look through the subterfuge and protect the wife,[21] but on principle, the ruling should be otherwise, because dower cannot attach until the legal title comes into the husband's hands and in these cases he has never acquired a legal estate in the property. Thus in the recent case of *Johnson* v. *Johnson* (Ark. 1912) 152 S. W.

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[16]Huntzicker *v.* Crocker, *supra;* Wyman *v.* Fox (1871) 59 Me. 100; see Winship *v.* Lamberton (1854) reported in Woodworth *v.* Paige (1855) 5 Oh. St. 70. Nor will it prevent recovery at law. Robinson *v.* Bates (Mass. 1841) 3 Met. 40.

[17]King *v.* King (1878) 61 Ala. 179; Manhattan Co. *v.* Evertson (N. Y. 1837) 6 Paige 457; Cox *v.* Wilder (U. S. D. C. 1870) 5 Nat. Bank Reg. 443.

[18]King *v.* King, *supra.*

[19]This argument would seem doubtful in a state where dower cannot be assigned. See Cox *v.* Wilder (U. S. C. C. 1872) 2 Dill. 45.

[20]Humes *v.* Scruggs, *supra;* Malloney *v.* Horan, *supra;* Richardson *v.* Wyman (1874) 62 Me. 280; Matthews *v.* Thompson (1904) 186 Mass. 14; see Meyer *v.* Mohr, *supra.* This holding is based on the theory that as the larger estate has never vested in the wife the dower could not merge with it.

[21]Redman's Admr. *v.* Redman (1902) 112 Ky. 760; Ward *v.* Ward, *supra;* Phelps *v.* Phelps (1894) 143 N. Y. 197; see Baird *v.* Stearne (Pa. 1882) 15 Phila. 339; King *v.* King, *supra;* see Feltz *v.* Walker (1881) 49 Conn. 93. Dower in trust property is given by statute in most states. See Cornog *v.* Cornog (1869) 3 Del. Ch. 407; Hopkinson *v.* Dumas (1861) 42 N. H. 296. Equity should look beyond all subtle attempts of the husband to defeat dower on this theory; Crecelius *v.* Horst (1881) 11 Mo. App. 304; but the weight of authority seems to be opposed to this view. Crecelius *v.* Horst (1885) 89 Mo. 356. Relief has been denied to the wife in the case of a fraudulent mortgage; Holmes *v.* Holmes (N. Y. 1832) 3 Paige 363; and when the titles were taken by a corporation in which the husband held the majority of stock. Poillon *v.* Poillon (1904) 85 N. Y. Supp. 689. If the husband is the trustee of an express trust, invalid by the Statute of Frauds, he may convey after marriage and dower will not attach. Firmstone *v.* Firmstone (1853) 2 Oh. St. 415.

1017, the husband, in order to defeat the claims of his creditors and to defraud his first wife, took the title of land, for which he furnished the purchase money, in the names of third parties. The deed was not set aside by creditors. There was no resulting trust to the husband because the conveyance was fraudulent as to creditors. Therefore, the court properly decided that the second wife was not entitled to dower.

RIGHTS OF CREDITORS OF THE MORTGAGOR AGAINST THE HOLDER OF AN UNRECORDED MORTGAGE.—As between the immediate parties, an unrecorded mortgage is, of course, a valid subsisting obligation,[1] and the administrator,[2] heir, or devisee of the mortgagor[3] takes title subject to the mortgage. And since, in the absence of any recording act, a creditor of the mortgagor can reach only the actual interest of his debtor, he too is subordinated to the equities of an existing unrecorded mortgage.[4] The result would be the same whether a mortgage is regarded as a lien or a conveyance because the equity of the mortgage is prior in time to the judgment of the creditor. Even though statutes have given the judgment-creditor a legal lien, he does not take precedence over an unrecorded equitable lien upon a distinct parcel of land for he has only a general lien which equity will defer to the prior specific lien.[5]

Recording acts, which seem a natural evolution of the common law livery of seisin,[6] seek to make every man's title to his real estate open to inspection,[7] and to give all those subsequently dealing with the property notice of any recorded encumbrance,[8] thereby protecting *bona fide* purchasers against secret transactions.[9] In some states the recording acts are framed so that they extend their protection only to *bona fide* purchasers, making no mention of creditors of the mortgagor.[10] In others, however, the rights of creditors generally,[11] or of

[1]Janes *v.* Penny (1886) 76 Ga. 796; Downing *v.* LeDu (1890) 82 Cal. 471; see Claridge *v.* Evans (1908) 137 Wis. 218.

[2]McBrayer *v.* Harrill (1910) 152 N. C. 712.

[3]McLaughlin *v.* Ihmsen (1877) 85 Pa. 364. An unrecorded mortgage is good against the creditor of the heir of the mortgagor. Literer *v.* Huddleston (Tenn. Ch. App. 1898) 52 S. W. 1003.

[4]Wheeler *v.* Kirtland (1873) 24 N. J. Eq. 552; see Tarver *v.* Ellison (1876) 57 Ga. 54; Goodenough *v.* McCoid (1876) 44 Ia. 659. An assignee for the benefit of creditors has only their rights, Alexandria Bank *v.* Herbert (1814) 8 Cranch 36, but some courts give him greater rights. See Kellogg *v.* Kelley (1897) 69 Minn. 124.

[5]2 Pomeroy, Eq. Jur. (3rd ed.) 721; see Sill *v.* Pinney's Adm'r. (1861) 12 Oh. St. 38.

[6]Loughbridge *v.* Bowland (1876) 52 Miss. 546, 553.

[7]Rosenbluth *v.* DeForest etc. Co. (1911) 85 Conn. 40.

[8]See Munro *v.* Merchant (N. Y. 1858) 26 Barb. 383, 405; reversed on another ground, (1863) 28 N. Y. 9; Stark *v.* Kirkley (1908) 129 Mo. App. 353.

[9]Openshaw *v.* Dean (Tex. Civ. App. 1910) 125 S. W. 989; McRaney *v.* Perry (1911) 9 Ga. App. 738.

[10]California (1909) Civ. Code § 1214; Ga. (1911) Code § 3260; Idaho (1909) Rev. Code § 3160; Iowa (1897) Code § 2925; Mich. (1897) Comp. Laws § 8988; Montana (1907) Rev. Codes § 4684; Nevada (1912) Rev. Laws § 1040; New York (1896) Rev. Stat. Part II, Ch. 3., § 1; North Dak.